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IN THE

Supreme Court Of The United States

October Term, 1975

NO. 75-953

Charles Ben Howell ..... *Petitioner*

V.

Clarence Jones, Sheriff
Dallas County, Texas ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE COMMITTEE TO OBTAIN A FAIR TRIAL FOR CHARLES BEN HOWELL AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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The Committee to Obtain a Fair Trial for Charles Ben Howell respectfully submits this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United

States. Both Petitioner and Respondent have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

This Amicus, the Committee to Obtain a Fair Trial for Charles Ben Howell, was formed specifically for the purpose of expressing the concern of its members to the Supreme Court of the United States with respect to the improprieties or indiscretions committed by the judge convicting Charles Ben Howell of contempt by engaging in ex parte communications during the pendency of the case before him.

The names and occupations of persons supporting and contributing to the efforts of this Committee are listed in the appendix hereto. The large majority of them are attorneys, one being a law professor, and the others practicing attorneys.

This case has received wide-spread attention in and around Dallas, Texas. Many practicing lawyers other than those listed herein have expressed concern as to the fairness of the Howell trial, or have otherwise expressed sympathy with the objectives of this Amicus. However, they have advised the Committee that they would deem it indiscreet in their particular situation to openly offer support to this committee.

SUMMARY OF ARGUMENT

One of the prime reasons for the filing of this Amicus Brief is that none of the courts reviewing these conviction has given any express consideration whatever to the three authorities which Amicus deems to be controlling:

1.

Commonwealth Coatings Corp. v. Continental Casualty Co., et al, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337, reh. den. 393 U.S. 1112, 21 L.Ed. 2d 812, 89 S.Ct. 848.

2.

The Code of Judicial Conduct, adopted by American Bar Association, August 16, 1972, Canon III, Article A, Sec. (4).

3.

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, adopted August, 1972, Standard 1.2, Standard 1.5, and Standard 1.6.

The United States Supreme Court reversed the Commonwealth Case because the "judge" failed to disclose his past business dealings with one of the

parties. The Court stated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." The new Judicial Canons and ABA Standards reflect that Judge Holland's conduct in failing to disclose his relations with Judge Walker and the Special Prosecutor was improper. This is not a personal attack on Judge Holland. We assume that he is intrinsically a fair-minded man and that these improprieties resulted from a misunderstanding on his part of his proper judicial responsibilities. Nevertheless, these indiscretions have created an "appearance of bias," which only can be cured by reversal for trial before a judge who is not a party to the impropriety. See Commonwealth Coatings Corp. v. Continental Casualty Co., supra.

It is the position of Amicus that the case is of substantial public importance. The new Canons and Standards adopted by the ABA have received extensive approval and praise. However, they will become mere empty shells unless they are implemented. The only way to implement them is to reverse the case where there is a significant violation thereof. The United States Supreme Court has announced a number of prophylactic decisions in recent years designed to protect the defendant's right to a fair trial and to uphold the dignity of the Courts. It is impossible to X-ray Judge Holland's mind to decide if he really was influenced. However, it is easy to see that he failed to comply with the requirements forbidding ex parte communications. The only way to control situations like this is to place a duty of disclosure on the judge and reverse the case when the judge fails to disclose ex parte communications received or made by him.

STATEMENT OF THE CASE

The orders, judgments and opinions necessary to an understanding of the case are contained in "Petitioner's Appendix," pages P.A. 1-42, attached to the Petition for Certiorari. The opinion of the United States Court of Appeals for the Fifth Circuit is found at pages P.A. 30-41. The Petitioner's "Statement of the Case" is found on his pages 19-24. A further statement of the facts relating to the ex parte discussions between Judge Holland, Judge Walker and the Special Prosecutor, Mr. Coleman, is found on Petitioner's pages P.A. 24-28. The confidential letter which Judge Holland received from Judge Walker and failed to disclose is on pages 28A and 28B of the Petition for Certiorari. On pages P.A. 50-51, Petitioner quotes Judge Holland's testimony as to how he advised Judge Walker that he, Judge Holland, was putting the burden of proof on the defendant. This Amicus has examined the briefs filed by Respondents in the Courts below. It does not appear that Respondent has any substantial dispute regarding the facts as stated by Petitioner. The facts already stated constitute a sufficient basis for the understanding of the points made in this Brief Amicus Curiae. This Amicus will only submit a further facts statement as follows:

For some time, Charles Ben Howell has been a controversial Dallas lawyer. He has repeatedly been an outspoken candidate for judicial office in the Dallas County Courthouse. In the course of his campaigns, his name has numerously appeared in the local press as

being critical of various practices and procedures in the Dallas County Courthouse and has expressed dissatisfaction with the performance of the incumbent judges.

In *March* of 1972, the Honorable Dee Brown Walker held Petitioner Howell in contempt for Petitioner Howell's conduct during the previous *May* at a default judgment hearing. Petitioner contends that the proceedings were, in fact, brought in retaliation for having charged Judge Walker, a little over a month previous, with tampering with court papers.

Petitioner Howell was not sent to jail immediately because of the provisions of Article 1911(a), Vernon's Texas Civil Statutes, Ann., providing that a lawyer must be released on personal recognizance bond "pending a determination of his guilt or innocence by a judge of a district court, other than the offended court."

The Hon. Louis T. Holland was appointed to hold the contempt hearing. During the hearing, Mr. Howell caught a glimpse of a personal letter from Judge Walker to Judge Holland, which copy was in the possession of the Prosecutor. Both Judge Walker and the Texas Court of Criminal Appeals refused to provide petitioner with a copy of this private letter or to order it to be provided. However, after Petitioner filed his habeas petition in the United States District Court for the Northern District of Texas, he was permitted to take the depositions of the two judges and the special prosecutor. Petitioner obtained a copy of the letter which is contained on Pages

28A and 28B of the petition for certiorari. In addition, it was disclosed in the course of these depositions that there had been an ex parte pre-trial conference between the trying judge, the complaining judge and the special prosecutor. All three parties to this meeting were extremely vague as to what took place.

However, one fact did clearly come out in the depositions, a fact which your Amicus believes to be most significant. During the course of his deposition, Judge Holland conceded that he notified Judge Walker that, he, Judge Holland, was in agreement with Judge Walker's argument concerning burden of proof.

Judge Walker argued in his letter of July 14, 1972 as follows:

> "It is our understanding that the determination of the certificate of contempt is the primary fact finding and that the burden of going forward will rest on Charles Ben Howell to rebut the determination heretofore made."

Judge Walker continued as follows:

> "My understanding of the proceeding would be to confirm the declaration and certificate of contempt by nominal testimony as to the facts upon which the court has concluded contempt, and then consider what defense, if any, Mr. Howell has before adjuging him guilty or innocent and fixing his punishment, if any."

In other words, Judge Walker was arguing that he, Judge Walker, had already convicted Petitioner

Howell and that the hearing before Judge Holland was a limited hearing for the purpose of giving Petitioner a chance to disprove the conviction against him. Judge Holland's testimony was that he told Judge Walker as follows:

> "I told him I thought he needed to make his own findings and set his own contempt fine and then it would be up to the new judge to review that and tell him whether or not it was an abuse or whether it was justified."

Judge Holland also testified that his discussions with Judge Walker were to the effect that "the other judge was called in to review, I thought that he had a job to review." In other words, Judge Holland's own testimony reflects that he sustained Judge Walker's argument. He placed Petitioner Howell under the burden of disproving the conviction filed against Petitioner Howell by Judge Walker.

Petitioner Howell argues that these procedures under Article 1911(a), Vernon's Texas Civil Statutes, Anno., constitute a denial of Due Process and Equal Protection guaranteed by the Fourteenth Amendment to the United States Constitution. Your Amicus suggests that the point is a strong one, but it will not be briefed by this Amicus.

We, therefore assume, for the purpose of argument, that the legal construction urged by Judge Walker was correct and that Judge Holland's ruling was a correct statemet of law. It makes no difference. A

party is still entitled to trial before a fair and impartial tribunal. A judge who enters into ex parte communications and lends a private ear to the opposition and who submits his rulings only to one party has conducted himself so as to deprive the trial of the necessary appearance of fairness and impartiality in order to maintain public confidence in the judiciary and its decisions. The case must be reversed for trial before another judge.

REASONS FOR GRANTING THE WRIT

This Amicus Curiae believes and urges the Court that the case is controlled by Commonwealth Coatings Corp. v. Continental Casualty Co., et al, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337, reh. den. 393 U.S. 1112, 21 L.Ed. 2d 812, 89 S.Ct. 848. That case involved an arbitration proceedings. The arbitrator in that case was the operator of a consulting business. The arbitrator had been employed from time to time by one of the parties, but he was not employed by that party at the time of the arbitration. The Supreme Court, speaking through the Honorable Mr. Justice Black, took the position that inasmuch as the employment was all a past matter, it would have been harmless if reasonable disclosure had been made. *However, the failure to make disclosure required the reversal of the case.* This Court stated in part:

> "Neither this arbitrator nor the prime contractor gave to petitioner even an intimation of the close financial relations that had existed between them

> for a period of years. We have no doubt that if a litigant could show that a foreman of a jury or a judge in a court of justice had, unknown to the litigant, any such relationship, the judgment would be subject to challenge. This is shown beyond doubt by Tumey v. Ohio, 273 U.S. 510 (1927) where this Court held that a conviction could not stand because a small part of a judge's income consisted of court fees collected from convicted defendants. Although in Tumey it appeared the amount of the judge's compensation actually depended on whether he decided for one side or the other, that is too small a distinction to allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case. Nor should it be at all relevant, as the Court of Appeals apparently thought it was here, that 'the payments received were a small part of (the arbitrator's) income. . .' for in Tumey the Court held that a decision should be set aside where there is 'the slightest pecuniary interest' on the part of the judge, and specifically rejected the State's contention that the compensation involved there was 'so small that it is not to be regarded as likely to influence improperly a judicial officer in the discharge of his duty . . . .' Since in the case of courts this is a *constitutional* principle, we can see no basis for refusing to find the same contempt in the broad statutory language that governs arbitration proceedings."

The United States Supreme Court went on to hold as follows:

> "We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than

> judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias."

Under Texas law, there is no right to trial by jury in a contempt case and a conviction for contempt may not be appealed. While the writ of habeas corpus is available to review a contempt conviction in Texas, the Texas courts have numerously stated that the review is of a limited scope. Petitioner has attacked the constitutionality of Article 1911 (a), Vernon's Texas Civil Statutes, Ann., as being in violation of the Due Process and Equal Protection Clauses of the United States Constitution for the denial of jury trial and the right of appeal. Your Amicus Curiae takes the position that Petitioner has presented a strong argument in this regard. However, again, this Amicus Curiae Brief does not cover those points.

We therefore assume, for the purpose of argument, that the Texas law is constitutional and that neither the denial of trial by jury or denial of the right of appeal denies any Constitutional Rights. However, just as in Commonwealth Coatings Corp. v. Continental Casualty Co., et al supra, this Texas procedure gives the judge "completely free rein to decide the law as well as the facts." The case is "not subject to appellate review." Thus, it is obvious that Judge Holland's failure to "disclose to the parties any dealings that might create an

impression of possible bias" is even more serious than it would be in an ordinary case subject to the normal laws of procedure specifically designed to safeguard the rights of the accused.

There is another aspect of Commonwealth Coatings Corp. v. Continental Casualty Co., supra, which is extremely important. The United States Supreme Court held that Section 18 of the Rules of the American Arbitration Association were "highly significant." That section requires a prospective arbitrator to "disclose any circumstances likely to create a presumption of bias." The Court also quoted Canon 33 of the old Canons of Judicial Ethics holding that a judge should be "careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships, constitute an element in influencing his judicial conduct."

Your Amicus argues that Canon 33 of the Old Judicial Canons, supra, is broad enough to include ex parte communications. Certainly, Judge Holland's negotiations constituted social or business relations or friendships of the type that would awaken the suspicion that they had constituted an element in influencing his judicial conduct. Moreover, your Amicus draws the Court's attention to Canon 17 of the old Canons of Judicial Ethics. See American Bar Association, Canons of Professional and Judicial Ethics, 1957 Edition, page 49:

JUDICIAL CANON 17.
EX PARTE COMMUNICATIONS

> "A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.
>
> "While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel."

According to the Foreword, page ix, in that book, Judicial Canon No. 17 was adopted on July 9, 1924 and amended on September 30, 1937. For the same effect, see Canon 11 adopted by the Judicial Section of the State Bar of Texas in 1964 and quoted on page 46 of the Petition for Certiorari.

Your Amicus would argue that, if a failure to disclose "dealings that might create an impression of possible bias" disqualifies an arbitrator, then it must disqualify a judge. The United States Supreme Court has ruled that "in the case of courts this is a *constitutional* principle." The Supreme Court's opinion further relies upon Codes of Ethics as being "highly significant" in determining whether or not the judicial officer has failed to "disclose to the parties any dealings

that might create an impression of possible bias." The Honorable Mr. Justice Black concluded on behalf of the Supreme Court as follows:

> "This rule of arbitration and this canon of judicial ethics rests on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Your Amicus Curiae draws attention to the words "any tribunal." Your Amicus Curiae argues that if there is any significant distinction between Commonwealth Coatings Corp. v. Continental Casualty Co., supra and the case of Howell v. Jones, 516 F.2d 53, we fail to grasp it. They are both cases of failure to disclose. As the Supreme Court carefully pointed out, the arbitrator was not in the employment of the opposing party at the time of the arbitration. Thus, it was not a case where the arbitrator had a financial stake in the case itself as in the old case of Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437. The opinion in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, condemned the judicial officer not because he had a financial stake in the case, but because he failed to disclose "circumstances likely to create a presumption of bias." In Tumey v. Ohio, supra, the judicial officer could not have cured his disqualification by disclosing his financial stake in the case whereas in Howell v. Jones, supra, all Judge Holland had to do was to disclose that he had gotten this letter and to decline to participate further in Judge Walker's attempt to bend his ear privately by the letter of July 14.

While your Amicus agrees that judges do not have to give up their social or business relations or friendships in order to be judges, they do have to make reasonable disclosure. Certainly, they have to do so when those social or business relations or friendships have included discussions regarding the very case pending before the court. The ultimate holding of the United States Supreme Court in this case is that "the appearance of bias" must be avoided and that the only proper means of avoiding it is full disclosure.

What are the grounds for distinguishing Commonwealth Coatings Corp. v. Continental Casualty Co., supra? For certain, the distinction cannot be based on the fact that one case involves an arbitrator and the other case involves a judge. The distinction cannot be based on the fact that Petitioner Howell's case is a criminal proceedings whereas Commonwealth Coatings Corp. v. Continental Casualty Co., supra, was a civil matter. If there is any distinction in this area, it has to be the other way around. The higher standard must be applied in criminal matters. The distinction cannot be based on the fact that Petitioner Howell's case arose in the State Court and comes here for review for deprival of Constitutional rights while Commonwealth Coatings Corp. v. Continental Casualty Co., supra, involved the federal arbitration statute. The opinion of the Supreme Court holds that in the case of courts, a fair and impartial judge "is a *constitutional* principle."

The only possible grounds for distinguishing the two cases, as we see it, is to say that the judicial officer

has a burden to disclose prior financial dealings with the parties one side or the other, but he has no obligation to disclose the fact that he engaged in ex parte communications with the parties, one side or the other. This grounds of distinction, your Amicus believes, simply will not hold water. It is a bad theory, bad policy and bad law.

The United States Court of Appeals for the Fifth Circuit took the position that "there is no evidence that they (meaning the ex parte communications) had any effect on the trial judge's determination of the merits of the case." The Fifth Circuit Court went on to say that "the legal determination that Howell's conduct was contemptuous appears only to have been made from information learned at the hearing." Your Amicus Curiae argues that the Fifth Circuit Court opinion has closed the door. The Fifth Circuit Court held that it is not possible to obtain relief on the grounds of ex parte communications unless it can be proved that the judge was actually influenced.

This Amicus Curiae replies as follows:

First, the Fifth Circuit Court has laid an impossible burden of proof on the injured party. How can you ever X-ray the mind of a judge to prove that he was or was not influenced or that he did or did not make his legal determination solely "from information learned at the hearing?"

Secondly, this holding is dead opposite to the holding in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, where the United States Supreme Court said that "*any tribunal*" which certainly would include judges, "not only must be unbiased but also must avoid even the appearance of bias."

Thirdly, your Amicus Curiae, with all due respect, argues that the decision of the Fifth Circuit Court is a dangerous precedent. It is dangerous from the standpoint that it has saddled the injured party with an intolerable burden of proof. The injured party is lucky to even find out that the judge has been talking out of school, much less ex parte discussions. If you hold that he also has to prove that the judge was actually influenced, you might as well go ahead and lay it on the line and say that there is no way that this type of breach of judicial discretion can be remedied. This is not the law. For sure, this is not what the law should be.

During the last several years, ethics in government has become a big issue. Full disclosure laws, open records laws, and codes of ethics are popping up all over the place. The legal profession and the judiciary are not behind the trend. In fact, they are at the head of the trend.

The American Bar Association has adopted a New Code of Judicial Conduct. Canon III, Article A, Sec. (4), states as follows:

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond."

This Canon is printed in a special section at the rear of Volume VI of the Martindale-Hubbell Legal Directory, 1976 Edition page 58C. According to the Preface, pages 55-56c, the Special Committee on Standards of Judicial Conduct which authored these Canons is a group of outstanding judges and lawyers. In particular, your Amicus notices the names of the Honorable Mr. Justice Stewart, Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit, and Judge Edward T. Gignoux, United States District Judge from the District of Maine. The Chairman was retired Chief Justice Roger J. Traynor from the Supreme Court of California.

Your Amicus also calls the Court's attention to the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Function of the Trial Judge, also adopted in 1972. Standard 1.2 provides as follows:

"The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the code of professional responsibility applicable to the legal profession, and standards concerning the proper administration of criminal justice."

Standard 1.5 provides as follows:

"The trial judge should avoid impropriety and the appearance of impropriety in all his activities, and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. He should not allow his family, social or other relationships to influence his judicial conduct or judgment."

Standard 1.6 provides as follows:

"The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."

In the "Commentary" under Standard 1.6, it is stated that "even when entirely innocent, *ex parte* discussions of pending cases have the appearance of partiality and therefore should be strictly avoided."

There was no shortage of distinguished jurists and lawyers on the panel which composed these Standards, either. According to the Preface to this book, published by the American Bar Association in 1972, pages viii-x, the Honorable Mr. Justice Blackmun served

on the Committee until he joined the Supreme Court. Other members were: Chief Judge Edward Allen Tamm of the United States Temporary Emergency Court of Appeals, Judge Frank J. Murray, United States District Judge from Massachusetts, and Judge Aubrey E. Robinson, Jr., United States District Judge from the District of Columbia. Judge Murray was the Chairman.

Your Amicus Curiae has now come to the hard question, the nitty gritty. There has never been any doubt as to a judge's duty to avoid ex parte situations. The duty has been plain at least since 1924 when the first set of Judicial Canons was adopted by the American Bar Association. Your Amicus Curiae argues that the only reason for going to the work and effort of preparing a new set of Canons and also preparing a set of Standards of Conduct for Trial Judges was to secure more up to date, more complete and more hardhitting principles to guide the country's judiciary. All that is now left is to put them to work. Your Amicus Curiae argues that the only way to put them to work is to reverse cases when the record shows that these Canons and Standards have not been followed to the extent that the complaining party has not received an open, fair trial. Otherwise, they will amount to nothing besides trivial platitudes. Referring back to that Preface on page 55C, at the rear of Volume VI, Martindale-Hubbell Legal Directory, 1976 Edition, your Amicus finds that the Canons in the New Code of Judicial Conduct are mandatory. "The canons and text establish mandatory standards unless otherwise indicated." However, the facts are that the American Bar Association has no

teeth. It is up to the United States Supreme Court to put the teeth in.

The Judges of the United States Court of Appeals for the Fifth Circuit are fine, hard working, upright Judges. However, the opinion in the case of Howell v. Jones, 516 F.2d 53 does not measure up to the Constitutional requirements of Due Process of Law.

They decided the case of Howell v. Jones, supra, entirely on the strength of an *overruled* case, to-wit, i.e. United States v. Grinnell Corp. et al., 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698. That case is dated in 1966 and Commonwealth Coatings Corp. v. Continental Casualty Co., supra, was decided in 1969. Therefore, *the first case has been overruled by the second case.*

That is, the second case *overruled* the first case unless the two cases are distinguishable. Your Amicus argues that there is a big enough distinction to drive the proverbial truck through. United States v. Grinnell, supra, is like the old Shadow radio show. The Defendants in that case claimed that there was evil lurking in the heart of the judge and the last your Amicus knew, a party has to prove what he has alleged. The Defendants alleged that the Judge was mad at them, that he didn't like them and that he was full of bile toward them but they fell down on their proof and that is all the case stands for.

In Commonwealth Coatings Corp. v. Continental Casualty Co., supra, the injured party didn't even claim

that the Judge was mad at them and they obviously didn't have to. What they did claim was that the Judge violated the Rules and Canons by failing to make a disclosure of his previous business dealings. They proved what they claimed and what they alleged and this was all they had to prove. They didn't have to go on and prove that the Judge did so because he was mad at them.

Your Amicus Curiae argues that when a Judge overrules a motion for continuance you don't have to prove that the Judge was "mad" at you or your client. All that has to be proved is that he made a mistake or indiscretion. The same applies when he refuses to let in your evidence or directs a verdict or anything else. It is always possible that he may have been as hot as a poker and just aching to pour it on you but you don't have to X-ray his mind and prove all that. All that has to be proved is that he made a mistake or indiscretion.

This Amicus Curiae is of the opinion that the Honorable Fifth Circuit Court jumped the track in its thinking in the case of Howell v. Jones, supra. The Canons of Ethics naturally provide that the judge is not supposed to get mad, angry or upset with any party but this is beside the point, because neither Petitioner Howell nor the injured party in Commonwealth Coatings Corp. v. Continental Casualty Co., supra, made that type of claim. The judicial officer in these cases violated an entirely different Canon of Judicial Ethics and an entirely different Standard of Trial Court Conduct. These "judges" failed to disclose their dealings with the other side of the case. This is a completely separate

violation and an entirely different case. Evil motives are beside the point. All that is necessary is to prove that the Judge made a mistake by doing so. His motives are just as immaterial in this instance as if he refused to strike the prosecutor's brother-in-law off the jury panel. You don't have to X-ray the Judge's heart and mind and prove why he did it. All you need to prove is that he did it.

If the opinion in the Howell case is to be adopted as the Law of the Land, then the Canons of Judicial Conduct, Canon III, Article A, Section (4) and the Standards of Criminal Justice, Standards 1.2, 1.5 and 1.6 have, for all practical intents and purposes will have been held for naught.

Your Amicus Curiae has not made a personal attack on Judge Holland, nor intends to do so. Judges, every one of them, are human beings. Human beings all have their failings - - they all make mistakes. When judges quit making mistakes, we won't need any more appeals courts. If people would quit making mistakes, we could get by without any courts at all and very few lawyers.

The case is basically a simple one. Judge Holland made a mistake. Mistakes such as this can either be condoned or they can be corrected. There is no way to split the difference. The only way to give Petitioner Howell a fair trial is to reverse and start over again. However, your Amicus Curiae argues that the question goes substantially further than this. The only way to see

to it that such mistakes are not repeated is to put some teeth into these fine Canons and Standards which have been adopted by the outstanding committees of the American Bar Association.

When police officers fail to obtain a search warrant, the United States Supreme Court has held that the evidence seized by them must be thrown out. Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684. It doesn't make any difference even if the evidence laying out on the table proves the defendant guilty beyond any shadow of doubt. The only way to see to it that police officers do not repeat their mistakes is to reverse the case.

Likewise, when the police failed to warn the accused of his rights, the confession must go out of the case. The rule prevents the police from continuing to make the mistake of failing to give the proper warnings. Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974.

The United States Supreme Court has also held that in order to prevent the mistake of allowing arresting officers who are going to testify from mingling with the jurors, the case must be reversed even where no prejudice is shown. Turner v. Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546. Whoever acts as baliff in charge of the jury is generally within the control of the Judge. This case, therefore, is precedent for reversing cases on account of mistakes of the Judge in order to see to it that such mistakes are not repeated.

After a twelve man (or woman) Trial Court jury finds the Defendant guilty beyond a reasonable doubt, the State might argue pretty strongly that defective procedures in selecting a grand jury are moot, harmless, immaterial and irrelevant. However, the United States Supreme Court put this kind of argument to rest many years ago. The United States Supreme Court holds that whenever minorities have been systematically excluded from the grand jury, the case must be reversed. Alexander v. State of Louisiana, 405 U.S. 625, 31 L.Ed.2d. 536, 92 S.Ct. 1221. The logic behind the rule is that this is the only way to control the mistakes of the judge in permitting systematic exclusion practices to persist. The only way to put a stop to this kind of thing is to reverse the case where it happens.

Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 holds that the mistake of systematically excluding women from trial court juries requires the case to be turned around. What does the sex of the jurors have to do with the defendant's guilt or innocence? The United States Supreme Court answered the question by holding that its ruling was prophylactic. This is the only way to correct this type of mistake and see to it that it is not repeated.

Your Amicus could extend the list of prophylactic decisions practically ad infinitum but the point has been made. The prophylactic cases hold that whenever the Judge, the prosecutor or the police fail to observe minimum standards of conduct, the case must be reversed and a new trial ordered. The policy behind

them has been developed by the United States Supreme Court over a period of years. The only way to see to it that these mistakes are not repeated is to reverse cases when such conduct occurs.

CONCLUSION

We do not think that it is possible to peer into Judge Holland's mind for the purpose of finding out if he was influenced. The United States Supreme Court declared itself without ability to do so in Commonwealth Coatings Corp. v. Continental Casualty Co., et al., supra. The Supreme Court simply held that this kind of mistake; that is, the failure to make reasonable disclosure, warrants sending the case back for re-consideration. Obviously, the United States Supreme Court granted the certiorari and wrote the opinion for the purpose of improving the standards that apply to arbitration proceedings. The question presently before the United States Supreme Court is whether the Supreme Court is ready to apply the same measure to Trial Court Judges who make similar mistakes. The new Judicial Canons and the new Criminal Justice Standards provide the Supreme Court with all the tools that it needs. Even though those Canons and Standards have been declared to be "mandatory", Your Amicus Curiae argues that the American Bar Association has no power to put teeth in the Canons and Standards that it worked so hard to produce. It is up to the United States Supreme Court to put in teeth where teeth are needed. Either these new Canons and Standards will be enforced or they will fall into disuse and oblivion. There is only one proper choice.

Your Amicus Curiae, the Committee to Obtain a Fair Trial for Charles Ben Howell, respectfully argues that the Petition for Writ of Certiorari to the United

States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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